UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

EDWARD J. ANDRESS, Appellant,	DOCKET NUMBER CH-0752-91-0619-I-1
v.	
UNITED STATES POSTAL SERVICE, Agency.	DATE: November 5, 1991

Leona Durham, Esquire, Cincinnati, Ohio, for the Appellant.

Richard L. Acker, Cincinnati, Ohio, for the agency.

BEFORE

Stephen E. Manrose
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant appealed from an action removing him on July 1, 1991 from the position of Mail Handler with the United States Postal Service, Cincinnati, Ohio. I held a hearing on August 23, 1991.

The appellant's appeal falls within the Board's appellate jurisdiction. See 5 U.S.C. §§ 7511(a)(1)(B), 7512(1), 7513(d). The agency's action is hereby AFFIRMED.

ANALYSIS AND FINDINGS

Merits of the Agency's Charge

The appellant's removal was based on a charge titled "Assaulting a Postal Employee." The supporting specification

alleges that at approximately 11:30 p.m. the appellant struck employee Charles Worsham in the left side of the face and kicked him in the groin.

Charles Worsham, Forklift Operator, testified that he was driving his forklift on the night in question when he stopped to check two skids he was carrying to make sure that they had not shifted. He stated that as he was climbing down from the forklift, the appellant walked toward him and stated "Mother f____r," do you have a problem?" (Tr. 10, 11, 40, 41). He further testified that when he got off the forklift the appellant swung at him with a clenched fist, striking him on the left side of his face, and that the appellant also kicked him in the groin (tr. 11, 12). He stated that he did not hit the appellant with his forklift, nor did he otherwise strike or provoke the appellant (Tr. 45). He further stated that he had not argued with the appellant nor did they have any cortact with each other earlier that day (Tr. 13, 45).

Mr. Worsham testified that following the incident he went to the Hospital to have his face examined and that he subsequently had his face examined on three other occasions (Tr. 14). He also stated that he filed criminal charges against the appellant and that those charges are still pending (Tr. 17).

The appellant testified that he started work at 3:00 p.m. on the day in question and that he first encountered Mr. Worsham at about 10:30 p.m. that same night when he was walking with John Bradford. He stated that they observed Mr. Worsham driving his forklift so recklessly that Mr. Bradford had to jump out of the way to avoid it (Tr. 251). The appellant stated that shortly after this incident Mr. Worsham rudely advised him that he needed to turn into an area with his forklift (Tr. 253).

The appellant testified that the incident in question occurred following his third encounter that day with Mr. Worsham. He stated that the forklift "made contact" with him as Mr. Worsham was back up, whereupon he asked Mr. Worsham, "Do you have a problem, mother f____r?" (Tr. 255, 256). He stated that Mr. Worsham then became enraged, started to climb down from the

forklift, and shoved the appellant out of the way to complete his climb down from the forklift (Tr. 256, 257). The appellant testified that he then slapped Mr. Worsham in reaction to the shove, whereupon Mr. Worsham punched him under his ear by the corner of his jaw (Tr. 257). He stated that he then kicked Mr. Worsham to keep him away (Tr. 258, 259).

Dennis Gurley, Mail Handler, testified that on the night in question he was standing about twenty to twenty-five feet from Mr. Worsham's forklift cleaning out a mail container when he thought he saw the appellant walk behind him (Tr. 57, 58). He stated that he then heard a punch, whereupon he quickly turned his head around and saw Mr. Worsham's head recoil as if he had been struck by the appellant (Tr. 58). He stated that Mr. Worsham looked shocked and surprised and that he had to be restrained from attacking the appellant (Tr. 59, 60, 66). HE further stated that he did not hear or see any evidence that Mr. Worsham had struck the appellant with his forklift (Tr. 66).

Mr. William Powell, Jr., Mail Handler, testified that he was about ten to fifteen feet away from the appellant and Mr. Worsham at the time of their confrontation (Tr. 77). He stated that he heard a thump and looked up to see the appellant's fist close to Mr. Worsham's face and Mr. Worsham's face

recoiling from the blow (Tr. 85, 86). He stated that based on this observation he concluded that the appellant punched Mr. Worsham with a closed rather than open hand (Tr. 86). He stated that he also observed the appellant try "this little kick move" (Tr. 79).

He stated that he grabbed Mr. Worsham to ask him if he was all right and to calm him down and restrain him from attacking the appellant (Tr. 79, 80). He further stated that he did not see Mr. Worsham hit the appellant with his forklift nor did he otherwise see him strike or provoke the appellant (Tr. 80 - 82). He observed that Mr. Worsham's face was "pretty swollen" after the incident (Tr. 87).

David Grosser, Mail Handler, testified that he noticed "some kind of commotion" and that he then saw the appellant kick Mr. Worsham in the area of his bladder (Tr. 104). He stated that he

did not see Mr. Worsham strike the appellant at any time (Tr. 104). He further testified that Mr. Worsham appeared "angry and quite upset" (Tr. 107).

The appellant's contention that Mr. Worsham hit him during the confrontation is not corroborated by any eyewitness testimony. In addition, the appellant's testimony that Mr. Worsham struck him in the face after he slapped Mr. Worsham is apparently inconsistent with the appellant's prior written

statement in which he made no mention of Mr. Worsham's alleged action in hitting him after he slapped Mr. Worsham. In the appellant's written statement, he only stated that Mr. Worsham "struck me and I struck him back" (Agency Response Fiel: Tab 4L). The apparent inconsistency between the appellant's present testimony before this Board and his prior written statement detracts form the credibility of the appellant's statements regarding this matter. *See Hillen v. Department of Army*, 35 M.S.P.R. 453, 459 (1987).

The appellant does admit that he used the referenced abusive language in addressing Mr. Worsham and that he also slapped him. He contends, however, that Mr. Worsham provoked the incident by the manner in which he drove the forklift and also by shoving the appellant out of the way when he got off the forklift. He therefore argues that, "at best," both he and Mr. Worsham were "equal participants" in the matter (Tr. 312).

There is some evidence in this record that indicates Mr. Worsham could have used more care in driving his forklift on the night in question. The appellant's testimony regarding the incident with Mr. Bradford is supported by the testimony of Mr. Bradford himself who stated that he did in fact have to jump out of the way of the forklift driven by Mr. Worsham earlier that night (Tr. 228). Even assuming

that this particular incident occurred as alleged by MR. Bradford and the appellant, it does not constitute provocation for any later physical retaliation by the appellant. The appellant's action in hitting MR. Worsham occurred almost one hour later. Moreover, the record indicates

that Mr. Bradford rather than the appellant was endangered by this prior incident.

I also find that Mr. Worsham's alleged rude language to the appellant regarding Mr. Worsham's desire to turn the forklift into a certain work area did not constitute sufficient provocation to lessen the seriousness of the appellant's later action in hitting Mr. Worsham. This alleged second incident apparently also occurred, according to the appellant's statements, more than one-half hour before the incident described in the agency's assault charge. More significantly, even assuming that an incident similar to that described by the appellant did occur, the appellant's later retaliatory response was grossly disproportionate to any comments made by Mr. Worsham.

The appellant also asserts that Mr. Worsham provoked him by brushing against him with the forklift and shoving him as he got down off the forklift immediately prior to the hitting incident at issue here. Neither of these assertions, however, are

corroborated by the testimony of any of the eyewitnesses, and they are denied by Mr. Worsham. To the extent that the forklift touched the appellant, I find that such touching was light in view of the lack of any injury to the appellant. In addition, there is no evidence that any such touching resulted from intentional conduct by Mr. Worsham. To the extent that the appellant felt endangered or was otherwise displeased by Mr. Worsham's driving of the forklift, he should have lodged a complaint against Mr. Worsham with some appropriate supervisory authority. The alleged brushing of the forklift driven by Mr. Worsham against the appellant, even assuming that it occured, did not justify any subsequent physical retaliation by the appellant.

The shoving incident, as related by the appellant himself, occurred after the appellant used abusive language directed at Mr. Worsham as Mr. Worsham was attempting to get off the forklift. Because the appellant admitted that to get off the forklift Mr. Worsham had to shove him out of the way (Tr. 256), I find that any physical contact that occurred when Mr.Worsham got

off the forklift was created by the appellant himself when he stood in Mr.Worsham's way.

All witnesses, including the appellant, then agree the appellant hit Mr. Worsham with a loud

blow to the face. Mr. Worsham testified that the appellant hit him with a closed fist. His testimony is supported in particular by the statement of Mr. Powell. Mr. Powell, a well-built, athletic young man, testified that he had boxing experience and could tell from the sound of the blow as well as by his observation of the appellant's fist shortly after the blow was struck that the blow was with a closed rather than open hand. It is also supported by the testimony of Mr. Gurley who stated that the blow sounded like a "punch". I find that Mr. Worsham's testimony, as supported by the testimony of these other witnesses, establishes that the appellant hit Mr. Worsham in the face with a closed rather than open hand.

Mr. Worsham understandably attempted to retaliate against the appellant after the appellant punched him. It was therefore necessary for Mr. Worsham to be physically restrained, while the appellant, according to the testimony of Mr. Gurley, did not need to be restrained (Tr. 59). Had Mr. Worsham rather than the appellant been the aggressor, as the appellant indicated in his testimony, I find that more likely than not the appellant would have attempted to retaliate against Mr. Worsham. Mr. Worsham's action in filing a criminal complaint is also consistent with his testimony that the appellant rather than himself was the aggressor.

The record also contains undisputed evidence that the appellant kicked Mr. Worsham. Even assuming I credit the appellant's testimony that he merely kicked Mr. Worsham to keep him away after he had already hit Mr. Worsham, I find that this conduct constituted further unwelcome and uninvited contact with Mr. Worsham's body and that it is supportive of the agency's assault charge.

There is some evidence that the appellant's conduct as described in this charge is consistent with at least one other incident that occurred shortly before this incident. Leonard

Adams, Supervisor of Mails, testified that on April 29, 1991, the appellant "chucked me with his arm or he hit me with his hand" as they passed each other. He stated that this action by the appellant resulted in a confrontation between the two of them (Tr. 205, 206). Evidence regarding this prior incident was introduced into the record at the insistence of the appellant. Although it is of limited probative value regarding the issue under consideration here and is not necessary to my finding below that the current charge against the appellant is supported by preponderant evidence, it does establish a likelihood that the appellant has a propensity for physically striking other individuals in an uninvited and unwelcome manner. Accordingly, this evidence

does add further limited support for the current charge.

I find, in summary, that the agency has supported by preponderant evidence its charge that the appellant assaulted Mr. Worsham. There is an inherent relationship between this conduct and the efficiency of the service so that the agency's disciplinary action was imposed based on proper cause. *See Blackford v. Department of the Navy*, 8 M.S.P.R. 712, 714 (1981). There is also proof that the Postal Service suffered actual damages because as a result of this incident it was required to pay Mr. Worsham's medical bills (Tr. 155-157). The appellant's conduct was therefore prejudicial to the interests of the Postal Service and violated the agency's code of ethical conduct (Agency Response File: Tab 4q). I find, in short, that the charge is sustained.

Affirmative Defenses

The appellant raises several affirmative defenses to the agency's action on appeal. He contends, inter alia, that the agency committed a harmful procedural error by not thoroughly investigating the current charge against him.

The agency obtained eyewitness statements shortly after the incident occurred that are contained in the agency's response file. The appellant has not shown that the agency was required to conduct a more extensive or thorough investigation

into the incident before it removed him, and I therefore find no evidence that it committed a procedural error in this regard. He further has not shown that any such error was harmful in that the error likely caused a different result to be reached in his case. I therefore find that he has not supported the allegation of harmful procedural error by preponderant evidence. 5 C.F.R. § 1201.56(a) (2) (iii), (b) (1), (c) (3) (1991).

The appellant also alleges that the agency's action discriminated against him because of a handicapping condition ("service-connected stress condition"). He submitted a January 8, 1991 statement from Dr. Eugene Somoza, M.D., who stated that the appellant has "post-traumatic stress," that he functions "fairly well" in his job, and that he uses counseling to help him tolerate a "stressful environment on the job" (Administrative File: Tab 7).

The appellant provided confusing testimony regarding whether this condition, which he stated occurred based on his service in the Vietnam war, caused him to strike Mr. Worsham. He initially denied that there was any causal connection between this condition and his action striking Mr. Worsham and stated that instead it was the "military experience" that caused him to hit MR. Worsham (Tr. 290). He testified, in that regard, that it was possible

for anybody who had served in he military to have reacted the same way he reacted in this case (Tr. 292). He then stated that because "management" created a stressful situation, he acted out in a "controlled hostile response" (Tr. 292).

As a part of the appellant's burden of proof, he must first establish that he has a handicapping condition. *See Kelly v. Department of Health and Human Services*, 46 M.S.P.R. 358, 361 (1990). The mere existence of a mental or physical impairment is insufficient to constitute proof of a handicapping condition. The appellant must also show that this impairment substantially limits one or more of his major life activities, that he has a record of such impairment, or that he is regarded as having such an impairment. *See Jones v. Department of the Navy*, 48 M.S.P.R. 117, 121 (1991). The fact that an impairment prevents an

employee from meeting the demands of a particular job does not mean that the employee is handicapped in the absence of evidence showing that the handicap generally forecloses the type of employment involved. *See Cohen v. Department of the Army*, 46 M.S.P.R. 369, 374 (1990).

Even assuming that this appellant has a mental impairment, he has not shown that any of his major life activities, including his ability to work at the

type of employment represented by his former position at the Postal Service, are substantially limited by the impairment. Dr. Somoza, in fact, stated that the appellant was able to function "fairly well" in his position. Because the appellant has not shown that he has a handicap, his allegation of handicap discrimination cannot be sustained. *See Kelly v. Department of Health and Human Services*, 46 M.S.P.R. at 361. I do not reach the issue of whether the appellant has established other necessary elements of proof in a case of handicap discrimination, including, inter alia, whether he is a "qualified" handicapped employee, the issue of whether his condition was accommodated by the Postal Service, and the issue of whether the alleged handicapping condition caused the conduct at issue.

The appellant also alleges that the agency's removal action in this case was in reprisal for an EEO complaint he filed on or about April 30, 1991. He has the burden of establishing that he engaged in a protected activity, that the accused official knew of the activity, that the adverse action could have been issued in retaliation under the circumstances, and that there was a genuine nexus between the alleged retaliation and the adverse action. *See Mack v. United States Postal Service*, 48 M.S.P.R. 617, 622 (1991).

The appellant did not show that either the proposing or deciding official in this removal action had any knowledge of an EEO complaint filed by the appellant (Tr. 183, 207). At the hearing, the appellant apparently amended his allegation by stating that he instead spoke to an EEO Counselor on or about April 30, 1991 (Tr. 243). Proposing official Leonard Adams

stated that the appellant may have requested to speak to an EEO counselor on that day (Tr. 210). The record, however, does not establish that the deciding official, Mr. William Thompson, General Supervisor, was aware of the appellant's April 30 visit to an EEO counselor.

Because Mr. Thompson decided to remove the appellant and he was unaware of the appellant's alleged protected activity, this record indicates that that protected activity did not influence his decision. Even assuming that he was aware of the appellant's EEO counseling visit and that that visit constituted a protected activity, the appellant did not establish the existence of a genuine nexus between that activity and his subsequent removal. Mr. Thompson credibly testified that the appellant's removal was based solely on the assault charge that formed the basis for that action. Although the appellant argues that there was a short time between the date the

appellant visited the EEO counselor and the date he was removed, the agency had no control over the date the appellant chose to assault a co-worker, and its ensuing disciplinary action was based on a legitimate, non-retaliatory reason. Furthermore, the appellant had submitted prior EEO complaints and grievances, over a period of several years prior to this removal (Administrative File: Tab 7), and he has not shown that his visit to an EEO counselor on April 30, 1991 precipitated the present removal action. For all these reasons, I find that he has not supported his reprisal allegation by preponderant evidence. It is therefore not sustained.

Penalty

The sustained charge against the appellant is very serious. The Board has held that mitigation of a removal penalty for an assault on another employee may be appropriate when (1) no serious injury results, (2) no weapons are used, (3) the employee has a history of satisfactory performance, (4) the agency does not rely on a past disciplinary record in selecting the penalty, and (5) there is an element of provocation. *See Faucher v. United States Postal Service*, 41 M.S.P.R. 336, 339 (1989). Under this method of analysis, there is no basis for mitigation of the

removal penalty in this case. I have found that Mr. Worsham's actions were not sufficient to provoke a reasonable person to assault him. I therefore find that an element of provocation did not exist.1/

Mr. Thompson testified that the Postal Service considers assault to be an offense that warrants removal (Tr. 163, 171). The record also shows that the appellant signed a statement when he was appointed to the Postal Service in 1983 which warned him that the postal Service imposes "severe action[s]" for those who commit physical assaults (Agency Response File: Tab 4N). This evidence indicates that the agency penalty in this case is consistent with the penalties imposed in similar cases and establishes that the appellant was placed on notice concerning the possibility he might be removed if he committed an assault on a fellow employee. I further that the Board has upheld removal actions in comparable cases. *See*

1/ I do not reach the issue of whether the injury inflicted upon Mr. Worsham, which required medical treatment, was "serious." I also do not reach the issues of whether the appellant has a history of satisfactory period or the extent to which the appellant's past disciplinary record should be considered. With respect to this latter issue, I note that although the agency did not cite any past disciplinary record in its removal notice, the appellant himself introduced evidence that he has an extensive past disciplinary history including at least three formal disciplinary actions for various reasons that were taken within six month prior to the date he was removed (Administrative File: Tab 7).

Bree v. Department of Health and Human Services, 49 M.S.P.R. 68, 72 (1991) (removal upheld based on one sustained charge of striking a co-worker in the face with a fist).

The appellant argues that imposition of the removal action in this case constitutes disparate treatment because Mr. Worsham was not also removed. Because Mr. Worsham did not assault the appellant, I find no disparate treatment and conclude that this allegation does not warrant a reduction in the agency's removal penalty.

I find that there are no other circumstances here that warrant a reduced penalty. The record does not indicate that the

appellant has a particularly lengthy or distinguished record of employment with the Postal Service. His actions in this case were intentional and his rehabilitative potential is questionable because although he indicated that he was sorry for the incident, he has continued to defend his actions on the basis that they were "what [he] had to do to get out of a hostile situation" (Tr. 267). I further find that no mitigating circumstances exist that are sufficient to warrant a reduction in penalty. Although the appellant argues that his medical condition constitutes a mitigating circumstance that lessens the seriousness of his actions, I find that he has not

supported that argument with any persuasive evidence, including evidence that he suffers from a handicapping condition. Even assuming some degree of mitigation would be appropriate under the circumstances of this case, the record does not show that such mitigation is so significant in nature that it warrants a reduction in the agency penalty.

I find, in summary, that the agency's decision removing the appellant was reasonably imposed. I therefore decline to mitigate the removal penalty. See Douglas v. Veterans Administration, 5 M.S.P.R. 280, 306 (1981)

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: /s/ Stephen E. Manrose
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on December 10, 1991, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission